

A Hong Leong Bank Berhad v Mercedes Builders Sdn Bhd & Ors

B HIGH COURT (KUALA LUMPUR) — GUAMAN NO D8–22–3 80 OF 2005
KANG HWEЕ GEE J
20 MARCH 2007

C *Civil Procedure — Summary Judgment — Whether triable issues raised — Whether restructuring agreement supercedes Hire Purchase Agreement — Whether plaintiff under duty to mitigate loss — Whether terms of restructuring agreement complied — Rules of the High Court, Order 14*

D The plaintiff/ respondent granted the first defendant five Hire Purchase facilities. The second to the fifth defendants were personal guarantors in respect of the performance of the first defendant in discharging its obligation under the five Hire Purchase Agreements. The first defendant defaulted in the repayment of the monthly Hire Purchase sums. Consequently the plaintiff and the first defendant entered into a restructuring agreement by a letter dated 3 June 2003, which was conditional on the first defendant executing a consent judgment by 10 June 2003 and recording the same in the Court hearing on 16 June 2003 for the entire outstanding owing as claimed in the suit under KL High Court D4-22-2054-2002 and the chargor of Kuching Lands, Nikmat Bidara Sdn Bhd providing an undertaking by 16 June 2003 to assign at least 20% of each of the progress payments receivable from Sarawak Housing & Development Commission, directly to the plaintiff until full settlement of both HLBB and HLFB loan outstanding and payment of RM3,000.00 per month commencing June 2003. Upon failure of the defendants to cause the undertaking to be provided and making only three payments, the plaintiff filed legal proceedings and the Senior Assistant Registrar allowed the plaintiff's application for summary judgment under O 14. The defendants appealed. The triable issues raised by the first defendant are that the Hire Purchase Agreement had been superceded by the restructuring agreement and that the defendant had already secured the undertaking from the Nikmat Bidara Sdn Bhd to assign to the plaintiff 20% of the progress payment which it would be receiving from Sarawak Housing and Development Commission, although they did not have the letter to prove that Nikmat Bidara had provided the undertaking to the plaintiff. Other letters were produced show the commitment on the part of the first defendant to fulfil their obligation under the restructuring agreement. Counsel for the second and fifth defendants adopted the submissions of counsel for the first defendant. The plaintiff's counsel responded that the restructuring letter dated 3 June 2003 had not superceded the Hire Purchase Agreement as the validity of the hire purchase agreement and the guarantee are well preserved at page 2 of the restructuring letter. The restructuring agreement was subject to certain conditions being fulfilled by the first defendant as well as a third party Nikmat Bidara Sdn Bhd. Nikmat Bidara Sdn Bhd has not provided the necessary undertaking by 16 June 2003 nor to date to assign at least 20% of the progress payment receivable from Sarawak Housing and Development Commission

directly to the plaintiff. The first defendant also only made three payments to the plaintiff under the restructuring agreement. Counsel for the second and fourth defendants replied that the restructuring agreement dated 3 June 2003 was a settlement between the first defendant and Hong Leong Bank and Hong Leong Finance. The letter dated 29 June 2003 was therefore not irrelevant as it was connected to the restructuring agreement and the payment of RM3000.00 per month to Hong Leong Finance was an ancillary payment to the whole restructuring agreement the substantial payment is to be made from the housing project. Therefore, the cause of action against the first defendant only arose when the first defendant was in breach of the restructuring agreement and the plaintiff terminated it. Counsel for the fifth defendant added that the plaintiff had a duty to mitigate which he failed to do so.

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Held, dismissing the appeal with costs:

- (1) The plaintiff's letter dated 3 June 2003 which the defendants chose to call 'restructuring agreement' was clearly not a novation agreement to substitute the parties' application under the five Hire Purchase Agreements entered into between the plaintiff and the defendants. Neither was it a novation agreement to substitute the obligations of the plaintiff and the guarantors (see para 12).
- (2) It was purely an offer by the plaintiff to settle the arrears of repayment under the five Hire Purchase Agreements. The first and second paragraphs of the second page of the letter clearly retains the right of the plaintiff to maintain its claim under the five Hire Purchase Agreements against the first defendant company and the second to fifth defendant guarantors (see para 13).
- (3) Having considered the evidence and heard the submission of the parties it is clear that at most the first defendant had complied with the third condition above by entering into the consent judgment in respect of the claim by Hong Leong Bank and partly complied with the second condition by making some payments to Hong Leong Bank Berhad (see para 15).
- (4) It follows therefore the obligation to settle the arrears of payment under the five Hire Purchase Agreements had remained undisturbed and the plaintiff was entitled to make a claim against the first defendant. The argument of the fifth defendant that there was a duty to mitigate the defendants' loss is untenable as in this case it was clear that the plaintiff did not repossess the machineries which were in the possession of the first defendant although it did issue a letter to the first defendant to surrender them (see para 16).

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[Bahasa Malaysia summary]

Plaintiff/responden telah memberikan defendan pertama lima kemudahan sewa beli. Defendan kedua hingga kelima adalah penjamin perseorangan berkenaan dengan prestasi defendan pertama dalam melepaskan tanggungjawabnya di bawah lima perjanjian sewa beli. Defendan pertama telah ingkar dalam pembayaran balik jumlah bulanan sewa beli. Menyebabkan plaintiff dan defendan pertama memasuki satu perjanjian penstrukturan semula melalui surat bertarikh 3hb June 2003 yang

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- A mensyaratkan ke atas defendan pertama melaksanakan penghakiman persetujuan pada 10hb Jun 2003 dan merekodkannya pada pendengaran mahkamah pada 16hb Jun 2003 untuk keseluruhan jumlah tertunggak yang terutang seperti mana yang dituntut dalam guaman di Mahkamah Tinggi Kuala Lumpur D4-22-2054-2002 dan penggadai Kuching Lands, Nikmat Bidara Sdn Bhd, menyediakan akujanji pada 16hb Jun 2003 untuk menyerahkan hak sekurang-kurangnya 20% setiap bayaran berperingkat yang diterima daripada Sarawak Housing & Development Commission, terus kepada plaintif sehingga penyelesaian penuh kedua-dua pinjaman HLBB dan HLFB yang tertunggak dan pembayaran RM3,000.00 sebulan bermula Jun 2003. Apabila kegagalan defendan-defendan bagi menyebabkan akujanji untuk disediakan dan hanya membuat tiga pembayaran. Plaintif memfailkan tindakan perundangan dan Penolong Kanan Pendaftar dalam membenarkan permohonan plaintif untuk penghakiman terus di bawah A 14. Defendan merayu. Isu untuk dibicarakan yang dibangkitkan oleh defendan pertama adalah bahawa perjanjian sewa beli telah digantikan oleh perjanjian penstrukturan semula dan defendan telah menjamin akujanji daripada daripada Nikmat Bidara Sdn Bhd untuk memperuntukkan kepada plaintif 20% daripada pembayaran berperingkat yang mana ianya diterima daripada Sarawak Housing & Development Commission, walaupun mereka tidak mempunyai surat untuk membuktikan bahawa Nikmat Bidara telah menyediakan akujanji kepada plaintif. Surat-surat lain yang dikemukakan menunjukkan komitmen pihak defendan pertama untuk memenuhi tanggungjawabnya di bawah perjanjian penstrukturan semula. Peguam defendan kedua hingga kelima menggunakan hujahan peguam defendan pertama. Peguam plaintif memberikan respon bahawa surat penstrukturan semula bertarikh 3 Jun 2003 tidak menggantikan perjanjian sewa beli berkenaan dengan kesahan perjanjian sewa beli dan jaminan adalah kekal terpelihara di mukasurat dua surat penstrukturan semula. Perjanjian penstrukturan semula adalah tertakluk kepada syarat tertentu yang perlu dipenuhi oleh defendan pertama begitu juga pihak ketiga Nikmat Bidara Sdn Bhd. Nikmat Bidara Sdn Bhd tidak menyediakan akujanji yang diperlukan pada 16hb Jun 2003 atau ketarikh ini untuk memperuntukkan sekurang-kurangnya 20% pembayaran berperingkat yang diterima daripada Sarawak Housing & Development Commission terus kepada plaintif. Defendan pertama juga hanya membuat tiga pembayaran kepada plaintif di bawah perjanjian penstrukturan semula. Peguam bagi defendan kedua dan keempat menjawab bahawa perjanjian penstrukturan semula bertarikh 3 Jun 2003 adalah penyelesaian di antara defendan pertama dan Hong Leong Bank dan Hong Leong Finance. Surat bertarikh 29hb Mac 2003 oleh itu tidak relevan yang mana ianya adalah berkaitan dengan perjanjian penstrukturan semula dan pembayaran RM3,000.00 sebulan kepada Hong Leong Finance adalah bayaran sampingan kepada keseluruhan perjanjian penstrukturan semula pembayaran utama perlu dibuat daripada projek perumahan. Oleh yang demikian kausa tindakan terhadap defendan pertama hanya timbul apabila defendan pertama memungkirkan perjanjian penstrukturan semula dan plaintif telah menamatkannya. Peguam defendan kelima menambah bahawa plaintif mempunyai tanggungjawab untuk mengurangkannya.
- I yang mana telah gagal dilakukannya.

Diputuskan:

- (1) Surat plaintif bertarikh 3hb Jun 2003 yang mana defendan memilih untuk

memanggil 'perjanjian penstrukturan' adalah jelas bukannya perjanjian novasi untuk menggantikan pihak-pihak, permohonan di bawah lima perjanjian sewa beli yang dimasuki di antara plaintif dan defendan. Ianya juga bukan perjanjian novasi untuk menggantikan tanggungjawab plaintif dan penjamin (lihat perenggan 12).

(2) Ianya adalah tawaran semata-mata oleh plaintif untuk menyelesaikan tunggakan pembayaran balik dibawah lima perjanjian sewa beli. Perenggan pertama dan kedua muka surat kedua surat tersebut jelas mengekalkan hak plaintif untuk mengekalkan tuntutan di bawah lima perjanjian sewa beli terhadap syarikat defendan pertama dan defendan kedua hingga kelima sebagai penjamin (lihat perenggan 13).

(3) Dengan mempertimbangkan bukti dan mendengar hujahan pihak-pihak ianya adalah jelas bahawa pada kebanyakan, defendan pertama telah memenuhi syarat tiga di atas dengan memasuki penghakiman persetujuan berkenaan dengan tuntutan oleh Hong Leong Bank dan memenuhi sebahagian syarat dua dengan membuat beberapa pembayaran kepada Hong Leong Bank Berhad (lihat perenggan 15).

(4) Ianya diikuti, oleh itu tanggungjawab untuk menyelesaikan tunggakan pembayaran di bawah lima perjanjian sewa beli kekal tidak diusik dan plaintif berhak untuk membuat tuntutan terhadap defendan pertama. Pernyataan defendan kelima bahawa terdapatnya tanggungjawab untuk mengurangkan kerugian defendan tidak dapat dipertahankan yang mana dalam kes ini adalah jelas bahawa plaintif tidak memiliki semula jentera-jentera yang mana dalam milikan defendan pertama walaupun ada mengeluarkan surat kepada defendan pertama bagi menyerahkannya (lihat perenggan 16).]

Notes

For cases on triable issues on summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3273–3308.

Cases referred to

Credit Corporation (M) Bhd v Bulan Sabit Sdn Bhd & Ors [1989] 2 MLJ 127 (refd)

Legislation referred to

Rules of the High Court 1980 O 14

CW Ling (Ho Loke & Koh) for the plaintiff.

Amir Asree (Zainul Rijal Tala & Amir) for the first defendant.

HY Lee (HY Lee & Sek) for the second and fourth defendant.

HP Chua (Onn & Partners) for the fifth defendant.

Kang Hwee Gee J:

[1] This is an appeal by the defendants against the decision of the Senior Assistant Registrar in allowing the plaintiff's application for summary judgment under O 14.

- A** [2] This is my oral judgment: (ex-tempore)
- [3] The claim arose from five Hire Purchase Agreements granted by Hong Leong Finance Berhad and which was subsequently assigned to Hong Leong Bank Berhad (the plaintiff in this case).
- B** [4] The second to the fifth defendants were personal guarantors of the first defendant in respect of the performance of the first defendant in discharging the first defendant's obligation under the five Hire Purchase Agreements.
- C** [5] The first defendant had defaulted in the repayment of the monthly Hire Purchase sums. Consequently the plaintiff and the first defendant entered into a restructuring agreement by a letter dated 3 June 2003 which reads as follows:
Your Ref : mhb-hlbb-041503
Our Ref : KLM/97/116
- D** MERCES BUILDERS SDN BHD WITHOUT PREJUDICE
No. 48, Ground Floor. Jalan 10/116B By Fax/Mail
Kuchai Entrepreneurs Park, Jalan Kuchai Lama Tel: 7982 6228
Kuchai Entrepreneurs Park, Jalan Kuchai Lama Tel: 7982 6228
- E** 58200 Kuala Lumpur. Fax: 7980 6670
Attn: Dato' Lee Hock Soon
Dear Sir,
HLBB - OVERDRAFT FACILITY OF RM3,000,000.00
OVERDUE TRADE FACILITIES OF RM124,000.00
- F** HLFB - INDUSTRIAL HIRE PURCHASE FACILITIES OF RMI,500,000.00
We refer to your letter dated 6 January 2003 and our meeting on 21 May 2003. After due deliberation, we are pleased to inform that HLBB and HLFB are agreeable on the followings:
- G** (1) To give consent on the subdivision of Kuching Lands;
(2) To allow nine months period till 28 February 2004 for redemption of Kuching Lands at the sum of RM740,000.00;
- H** (3) To allow waiver for the sum of RM106,000.00 for IHP facilities with HLFB. However, this waiver will only be effected at the tail end when you make full settlement of the said facilities;
(4) To accept RM3,000.00 per month commencing June 2003 till August 2003 and thereafter subject to review.
- Please take note that the above arrangements are subject to:
- I** (a) You execute the consent judgement by 10 June 2003 and to record the same in the court hearing on 16 June 2003 for the entire outstanding owing as claimed in the suit under KL High Court D4-22-2054-2002.

- (b) The chargor of Kuching Lands, Nikmat Bidara Sdn Bhd, to provide undertaking by 16 June 2003 to assign at least 20% of each of the progress payments receivable from Sarawak Housing & Development Commission, directly to us until full settlement of both HLBB and HLFB loan outstanding **A**
- (c) Repayments agreed upon are duly complied with failing which the arrangement is to be treated as null and void. **B**
- (d) HLBB and HLFB reserve the right to terminate this agreement without notice and proceed with further legal actions in the event of non-compliance of any term herein.

The letter of consent for subdivision of Kuching Lands shall be forwarded to you upon compliance of cl (a) and (b) **C**

Save and except the variations set out in this letter, all terms and conditions in the Letter(s) of Offer, agreement(s) and/or any security documents in respect of the banking facilities and Industrial Hire Purchase Agreement(s) shall continue to be in full force and effect and nothing herein above shall prejudice our rights under the existing legal suit as stated above and the foreclosure proceedings. **D**

Notwithstanding anything contained herein, we reserve the right to proceed with the civil and foreclosure proceedings unless all the terms of the proposed redemption and settlement have been complied with by you. Kindly indicate your acceptance by signing and returning us the duplicate copy of this letter within seven days from the date hereof, failing which this offer will lapse and we shall continue with our recovery action. **E**

Your urgent attention is highly appreciated.

Yours faithfully,

For HONG LEONG BANK BERHAD **F**

Sgd.

T.J. TAN

Manager

Remedial Management Department

Sgd.

LEE WENG SWEE

Manager

Remedial Management Department **G**

c.c. HLB - Che Mokhtar & Ling

HLF-Ho, Loke & Co

I/We hereby accept the terms and conditions as stated hereinabove

MERCES BUILDERS SDN BHD **H**

Sgd

AUTHORISED SIGNATORIES

Date : 9 JUN 2003

Company Stamp:" **I**

[6] The grounds relied upon by the first defendant are as follows: (verbatim)

- A** (1) The Hire Purchase Agreement had been superceded by the restructuring agreement as evidenced by the letter exh 'LHS-1'. Paragraph (a), (b), (c) and (d) of the letter clearly states the first defendant was obliged to execute a consent judgment in favour of the plaintiff in respect of a suit at the KL High Court D4-22-2054-2002 for this restructuring agreement to be effective.
- B** (2) The first defendant has complied with this requirement by executing the consent judgment on 16 June 2003.
- (3) We had also complied with paragraph b of the agreement whereby we had already secured the undertaking from the Nikmat Bidara Sdn Bhd to assign to the plaintiff 20% of the progress payment which it would be receiving from Sarawak Housing and Development Commission. We do not have the letter in our possession to prove that Nikmat Bidara had provided the undertaking to the plaintiff but we have a letter written by the plaintiff to the Land Office informing the Land Office that the plaintiff had no objection to the subdivision of the land submitted by Nikmat Bidara which proves that the undertaking must have been given as otherwise the plaintiff would not have issued such letter.
- C**
- D** (4) By another letter exh 'LHS-3' plaintiff had reconfirmed it accepted the proposal whereby the plaintiff was prepared to accept the terms pertaining to the commencement of the progress payment upon the commencement of the development project.
- E** (5) By a letter dated 14 October 2004 exh 'LHS-4' the first defendant issued a letter to the plaintiff informing that the proposed development of Nikmat Bidara land was still on-going but there was a change in the government planning policy with respect to density of the area and also by this letter informed the plaintiff that the 1st defendant proposed to submit the planning brief to the authority to accommodate the new development density. In this letter also the first defendant seek the plaintiff consideration for extension of time facility to commence the project.
- F**
- (6) The letters produced show the commitment on the part of first defendant to fulfil their obligations under the restructuring agreement.
- G**
- [7] The counsel for the second and fourth defendants had nothing to add – will adopt what is submitted by counsel for the first defendant. Counsel for the fifth defendant is not present but first defendant counsel says he (fifth defendant) would adopt his submission.
- H**
- [8] Reply by counsel for the plaintiff (verbatim):
- (1) Basically our claim is based on the breach of the five Hire Purchase Agreements which were guaranteed by the second to the fifth defendants.
- I** (2) The restructuring letter dated 3 June 2003 had not superceded the hire purchase agreement. The validity of the hire purchase agreement and the guarantee are well preserved at page 2 of the restructuring letter which reads as follows:

Save and except the variations set out in this letter, all terms and conditions in the Letter(s) of Offer, agreement(s) and/or any security documents in respect of the banking facilities and Industrial Hire Purchase Agreement(s) shall continue to be in full force and effect and nothing herein above shall prejudice our rights under the existing legal suit as stated above and the foreclosure proceedings. Notwithstanding anything contained herein, we reserve the right to proceed with the civil and foreclosure proceedings unless all the terms of the proposed redemption and settlement have been complied with by you.

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(3) The restructuring agreement was subject to certain conditions being fulfilled by the first defendant as well as third party Nikmat Bidara Sdn Bhd.

(4) Contrary to first defendant's submission the third party which is Nikmat Bidara Sdn Bhd has not provided the necessary undertaking by 16 June 2003 to assign at least 20% of the progress payment receivable from Sarawak Housing and Development Commission directly to the plaintiff.

C

(5) The issuance of the letter of consent for subdivision by the plaintiff to the Land Office in Sarawak does not mean that Nikmat Bidara had provided the undertaking as explained by the deponent of the plaintiff's affidavit. The said letter of consent was issued by the plaintiff from his own record to facilitate the carrying on of the project on the land which was charged to the plaintiff which Nikmat Bidara was supposed to develop.

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(6) From our record no such undertaking was forthcoming until today from Nikmat Bidara.

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(7) The other condition requiring the first defendant to pay commencing from June 2003 the sum of RM6,000.00 to the first defendant's overdraft account in order that the sum of RM3000.00 is utilised to pay the first defendant's overdraft account and the remaining RM3000.00 to pay the overdue hire purchase instalment. Our record shows that the first defendant only made three such payments.

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(8) The letter dated 29 March 2003 actually refers to the overdraft and trade facilities granted by Hong Leong Bank Berhad which is irrelevant.

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[9] Reply by counsel for the second and fourth defendants (verbatim):

(1) The restructuring agreement dated 3 June 2003 was a settlement between the first defendant and Hong Leong Bank and Hong Leong Finance. The letter dated 29 March 2003 was therefore not irrelevant as it is connected to the restructuring agreement. This can also be seen in paragraph (b) of the restructuring agreement dated 3 June 2003 which states clearly that the payment receivable from Sarawak Housing and Development Commission will have to be paid to Hong Leong Bank and Hong Leong Finance for the purpose of loan financing.

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(2) The mode of payment for these two accounts Hong Leong Bank and Hong Leong Finance that is to say the substantial payment would be coming from the progress payment from the said housing project in Sarawak. Therefore the payment of RM3000.00 per month to Hong Leong Finance is but an ancillary

- A** payment to the whole restructuring agreement wherein as mentioned the substantial payment to be payable to the housing project.
- (3) The restructuring agreement must be read together with the original agreement because
- B** (a) The plaintiff has admitted the existence of such an agreement;
(b) The plaintiff also pleaded paragraph 26 of the statement of claim that the first defendant had failed to comply with the restructuring agreement.
It follows therefore the cause of action against the 1st defendant only arises when the 1st defendant is in breach of the restructuring agreement and the plaintiff terminates it.
- C** Submits: The plaintiff's Statement of Claim is defective as paragraph 26 of the Statement of Claim did not state the material facts of the restructuring agreement dated 3 June 2003. Moreover the plaintiff fails to particularise the facts of the restructuring agreement namely the terms of the restructuring agreement. Further the plaintiff did not even exhibit the restructuring agreement in the affidavit in supporting their application under O 14.
- D**
- E** We further submit that the 1st defendant was not in breach of the restructuring agreement. This is because the first defendant complies with the restructuring agreement namely by entering a consent judgment dated 16 June 2003 and the first defendant also fulfils the paragraph (b) of the restructuring agreement. This is confirmed by the plaintiff when the plaintiff issued a letter of consent for subdivision as in accordance with the restructuring agreement. We would like to emphasise that the letter of consent which is issued by the plaintiff dated 30 June 2003 when only the first defendant complies with paragraph (a) and (b) of the restructuring agreement. Hence from the above it shows that the first defendant has complied with the restructuring agreement.
- F**
- (4) In respect of the RM3000.00 monthly payment towards the restructuring agreement between Hong Leong Bank and Hong Leong Finance and this RM3000.00 per month would be commencing from June 2003 till August 2003 and thereafter subject to review.
- G** The plaintiff alleged in respect of the RM3000.00 per month as follows:
Plaintiff's allegation that we only paid 3 payments may not be correct. Further the plaintiff states that the first defendant made irregular payment. The accounts exhibited under 'HLB-1' shows that there is no payment by the first defendant. Based on this fact it cannot be said that the plaintiff has proof that the first defendant had failed to make the payment according to the restructuring agreement. Even though the first defendant's payment of RM3000.00 is irregular that does not entitle the plaintiff to terminate the restructuring agreement. This is because the plaintiff knew and agreed that the substantial payment of the amount owing to Hong Leong Bank and Hong Leong Finance which is approximately 4.6 million ringgit would have to come from the proceeds of the housing project in Kuching as agreed in the restructuring agreement. The RM3000.00 is not the main substance of the restructuring agreement. Furthermore as to date there is no termination letter issued by the plaintiff in respect of the restructuring agreement. The plaintiff also failed to issue any letter of demand which is based on the
- H**
- I**

restructuring agreement. Furthermore as to date there is no termination letter issued by the plaintiff in respect of the restructuring agreement. The plaintiff also failed to issue any letter of demand which is based on the restructuring agreement.

A

[10] Counsel for the fifth defendant now present says he adopts the submission of counsel for the first defendant and the second and fourth defendants. He has the following submission to add:

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- (1) The plaintiff did issue notice to repossess but did not proceed to repossess. Had it been repossessed then the guarantors would have to pay less.
see *Credit Corporation (M) Bhd v Bulan Sabit Sdn Bhd & Ors* [1989] 2 MLJ 127 per Shankar J at Held:

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(3) The claim for the plaintiffs was not one for a liquidated demand. In this kind of claim the action is for unliquidated damages and O 14 is wholly inappropriate. One cannot convert an unliquidated claim to a liquidated one merely by putting down some allegedly precise mathematical calculation. What is reasonable in any particular case is more than a matter of mathematics.

D

(4) The long delay between the date of repossession and the date of sale did raise a triable issue as to whether the plaintiffs had been prudent in the measures they adopted for the disposal of the goods. They have a duty to mitigate and they must show that they did so."

E

Submits: There is a duty to mitigate.

REPLY BY COUNSEL FOR THE PLAINTIFF

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[11] The plaintiff did issue a notice to the first defendant requesting them to return the subject matter equipment to the plaintiff as required under cl 9.1 of the 5 Hire Purchase Agreements. It is the plaintiff's contention that the defendants had agreed under cl 9.1 as well as 9.2 of the Hire Purchase Agreements that the plaintiff has no obligation to mitigate. This is clearly provided in cl 9.1 and 9.2.

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FINDINGS AND DECISION

[12] The plaintiff's letter dated 3 June 2003 which the defendants chose to call 'restructuring agreement' was clearly not a novation agreement to substitute the parties' application under the 5 Hire Purchase Agreements entered into between the plaintiff and the defendants. Neither was it a novation agreement to substitute the obligations of the plaintiff and the guarantors.

H

[13] It was purely an offer by the plaintiff to settle the arrears of repayment under the five Hire Purchase Agreements. The first and second paragraphs of the second page of the letter clearly retains the right of the plaintiff to maintain its claim under the five Hire Purchase Agreements against the first defendant company and the second to fifth defendant guarantors.

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A [14] The obligation under the five Hire Purchase Agreements would only be discharged if the first defendant satisfies the following conditions proposed in the said letter:

B (1) The chargor of Kuching Land Nikmat Bidara executes an undertaking by 16 June 2003 to assign at least 20% of each of the progress payment receivable from Sarawak Housing and Development Commission directly to the plaintiff until full settlement of both outstanding accounts owed to Hong Leong Bank and Hong Leong Finance.

C (2) To pay RM3000.00 per month to Hong Leong Bank Berhad in respect of the repayment of the outstanding hire purchase payments commencing from June 2003 till August 2003 and thereafter subject to review.

(3) To execute the consent judgment for the sums owing to Hong Leong Bank Berhad under the overdraft and trade facilities (the subject of another suit under KL High Court No. D4-22-2054-2002).

D [15] Having considered the evidence and heard the submission of the parties it is clear that at most the first defendant had complied with the third condition above by entering into the consent judgment in respect of the claim by Hong Leong Bank and partly complied with the second condition by making some payments to Hong Leong Bank Berhad.

F [16] It follows therefore the obligation to settle the arrears of payment under the five Hire Purchase Agreements had remained undisturbed and the plaintiff was entitled to make a claim against the first defendant. The argument of the fifth defendant that there was a duty to mitigate the defendants' loss is untenable as in this case it is clear that the plaintiff did not repossess the machineries which were in the possession of the first defendant although it did issue a letter to the first defendant to surrender them.

G [17] The fact that the plaintiff had issued a letter to the Land Office in Kuching confirming its consent as a chargee of the land to be developed into a housing estate does not necessarily mean that the required letter of undertaking had been given by Nikmat Bidara to the plaintiff.

H [18] The first defendant would have to show some evidence that indeed the undertaking had been given which it had failed to do.

[19] In the event the first defendant is liable to pay the plaintiff the arrears of repayment under the five Hire Purchase Agreements.

I [20] The obligations of the second to fifth guarantors are co-extensive with the obligation of the first defendant. They are therefore jointly and severally liable to pay the plaintiff the sums that they have guaranteed.

[21] There is clearly no triable issue in the plaintiff's claim.

[22] The appeal against the decision of the Senior Assistant Registrar is dismissed with costs.

Appeal dismissed with costs.

Reported by Navit Kaur Randhawa

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